IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

No. 2866.

BRIEF OF APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

FRANCIS A. GARRECHT,
United States Attorney,
Spokane, Washington.

E. W. BURR,
Special Assistant to U. S. Attorney,
Attorneys for Appellee.

SHAW & BORDEN CO. 168826

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PRELIMINARY STATEMENT

By stipulation it is established that in 1905 an effort was being made to have the Secretary of the Interior undertake the Yakima Reclamation Project. (Record, page 58.)

The legislature of the State of Washington passed an act approved March 4, 1905 (L. 1905, p. 180), "Relative to the use of state waters for irrigation purposes" and granting to the United States the right to exercise the power of eminent domain in acquiring lands, water and other property. Pursuant thereto

the United States on May 10, 1905, filed in the office of the Commissioner of Public Lands of the State of Washington, a notice of withdrawal of the unappropriated waters of the Yakima River and its tributaries. (R., p. 58.)

On December 12, 1905, the Secretary of the Interior notified the Geological Survey, then in charge of the work of the Reclamation Service, of the conditions required to be met as a pre-requisite to the construction of the Yakima Project. (R. 59.) These were re-stated in the letter to Congressman (now Senator) W. L. Jones, which is "Plaintiff's Exhibit 1."

Among said conditions were the following:

"First. The adjustment of all conflicting claims of those who are appropriating water from the Yakima River or any other body of water, for irrigation, power or any other purpose.

"Second. The determination of all suits now pending to prevent the diversion of water from the Yakima River to the Yakima Indian Reservation, and any and all other litigation that in any way tends to embarrass or restrict the appropriation of the waters from said river or any other body of water needed for the irrigation of the lands under said proposed projects."

At this time water litigation was pending. (R., p. 202.) Indeed, it is conceded that as early as 1903, and since during the low water season of each year the water supply of the Yakima River was wholly exhausted. (R., p. 64.) Eliminating the stored waters, the claims perfected, partly perfectly and imperfected, in the aggregate greatly exceeded the supply.

To adjust these conflicting claims, and permanently settle the rights of water users appeared to present a situation which inevitably would involve in litigation all claimants of water rights in the Yakima River which would include the appellant corporation.

To the Yakima water users was thus presented the alternative,—the adjustment out of court of all water rights and the construction of the Government's reclamation project with the incident expenditure of large sums of money in the valley; or the refusal of the Reclamation service to have anything to do with the Yakima Project, and extensive, costly and uncertain litigation over water rights.

Property owners in the Yakima Valley were desirous of having the project undertaken (R., p. 84.), and the Commercial Clubs appointed committees of citizens to adjust conflicting claims and secure concession of rights so that the requirements of the Government might be met. (R., pp. 82-188.)

Public meetings were held, some of which were addressed by the engineers of the Reclamation Service. The statements made by them were to the effect "that no project could be undertaken in the valley until these various appropriators had all signed an agreement, agreeing to limit their rights to such quantities of water that the total amount of all these claims as signed up, would not be more than the water which flowed in the Yakima river." (R., pp. 186-187-188-82.)

The settlement of the amount of water for insertion in the instrument was left with the committee and the water claimants and with the final negotiations the United States officials had nothing to do. (R., p. 187.)

The water users signed limiting agreements in which the maximum claim for water was specifically stated, and suits pending in court were dismissed. (R., p. 6.) Thereupon the Secretary of the Interior on March 27, 1906, authorized the construction of the Yakima project and up to the time of trial had expended thereon about $7,420,000. (R., p. 60-61.)

These limiting agreements, some fifty in number, with the exception of the amount of water specified in the schedule, are all identical with the one executed by the appellant which is printed in the record. R., pp. 22-23.)

It is this instrument limiting appellant to eighty cubic feet of water per second of time which the Government asks the court to enforce but which appellant seeks to repudiate, or at least to have so construed as to permit it to enjoy 104.6 cubic feet, an increase of nearly one-third of the amount claimed by it at the time of the adjustment of water rights in the Yakima River.

The defendant and its stockholders received the consideration for which the agreement was executed, to-wit, freedom from litigation, the settlement of their water rights and of those of their rivals and the expenditure by the United States of millions of dollars in Kittitas County with consequent improved market conditions.

After the execution of the limiting agreement in question it appears that some of defendant's stockholders became dissatisfied with the amount which had been claimed on their behalf, and one stockholder (R., p. 191), who at the time had other business with him, stated to Mr. Noble, *whose connection with the Reclamation Service had been severed several months prior thereto*, that the company did not feel bound by the agreement. (R., p. 192.) This conversation is the only evidence in the record of any expression of dissatisfaction of the stockholders with the contract, except among themselves.

There is not a scintilla of evidence to indicate that the dissatisfaction of any stockholder, either as an individual or in any official capacity for the defendant, was ever brought to the attention of any agent of the United States. The assertion in appellant's brief that "the Company notified the officer who had conducted the negotiations for the government that they refused to be bound by the signed agreement," does not comport with the facts. The necessity for making such statement doubtless lies in the fact that the defense to the limiting agremeent must fail, both in law and morals, on account of appellant's failure to give any notice of its disavowal of the contract until after the government in express reliance upon the good faith and validity of these limiting agreements, had expended more than $7,000,000.

ARGUMENT.

A Cause of Action Stated.

The first assignment of error argued raises the question that the complaint does not state a cause of action.

The amended complaint is sufficient and no attack upon it was made in the court below. But if it were correct that the amended complaint did "not show that the United States, or any one in privity with it, has been deprived of the use of water," or "that present injury has been caused it or any one in privity with it," the stipulation entered into at the trial has so broadened the amended complaint that all these matters are now conceded as the following quotations from the record show:

"It is stipulated (R., p. 58):

"That in pursuance of the act of the state legislature aforesaid Secretary of the Interior on March 8th, 1909, authorized the director of the Reclamation Service to "construct under the provisions of the Reclamation Act such works as may be necessary for the full untilization of the waters so withdrawn (referring to the withdrawal made as aforesaid under the act of March 4, 1905), using therefor the funds now available under allotments already made, and the funds to be made available from time to time in the future in accordance with the regular procedure established for that purpose." (R., p. 61.)

"That on September 2d and 3d, 1890, notice of appropriation in accordance with law was posted and filed for record in the office of the auditor of Yakima County by the agents of the Northern Pacific, Yakima

& Kittitas Irrigation Company to the amount of 2000 cu. ft. per second of time. Thereafter by the agents of the company an amended notice of appropriation dated March 23, 1891, was duly made for 1000 cu. ft. per second of time. That thereafter by mesne conveyances the water appropriation so made, together with an appropriation initiated prior thereto by the Kennewick Ditch Company for 54 cu. ft. of water per second of time passed to the Washington Irrigation Company." (R., p. 61-62.)

"That by deed dated June 23, 1906, the said Washington Irrigation Company conveyed both the said water rights to the plaintiff herein, said deed being recorded August 29, 1906, Vol. 47 of Deeds, at page 586, records of Yakima County.

That the said appropriation of 54 cubic feet per second on the part of the Kennewick Ditch Co. and that of the Washington Irrigation Co. for 1,000 cubic feet per second were, prior to the said transfer to the United States, consummated by beneficial use, the former water-right in the entirety and the latter to the extent of approximately 650 cubic feet per second and by the irrigation of large bodies or irrigable land under canal of the Washington Irrigation Co. known as the Sunnyside Canal, appurtenant to approximately 40,000 acres of land. (R., p. 62.)

"That following out the withdrawal of the waters aforesaid the United States has constructed irrigation systems for the beneficial use of water from 90,000 acres upon the Sunnyside unit and 34,500 acres upon the Tieton unit of the Yakima project and is engaged upon the construction of additional portions of the Sunnyside unit, which, when completed, will increase the area of said unit to 102,000 acres approximately. The United States has furthermore entered into a contract with the irrigation district known as the Kittitas Reclamation District and agreed upon certain conditions contained in said contract to furnish water from the natural flow of the Yakima River from storage reservoirs constructed and to be constructed upon the headwaters of the Yakima River." (R., p. 63.)

"That defendant has its point of diversion above the points of diversion for the plaintiff's Sunnyside and Wapato canals." * * *

"That the plaintiff is able and plans to make use of the natural flow existing in the Yakima River during normal years, except during periods of exceptional and brief high water subsequent in each year to May 1. That the amount of stored water which plaintiff is able to secure from its Bumping Lake and Kachees reservoirs already constructed, from its Keechelus reservoir now under construction and from its proposed Cle Elum and McAllister's Meadows reservoirs is 1,082,000 acre-feet from which an estimated annual draft of 1,000,000 acre-feet can be made, and in order to irrigate the aforesaid area of 500,000 acres the plaintiff plans to utilize from the natural flow of the Yakima river prior to July 1, in each year 1,000,000 acre-feet from the natural flow of the Yakima river and its tributaries. (R., p. 64.)

RIGHT OF THE UNITED STATES TO PROTECT ITS INTERESTS IN THE YAKIMA RIVER BY AN INJUNCTION SUIT IS BEYOND QUESTION.

By the second, third, fourth and fifth assignments of error it is contended that the United States had no authority to maintain this suit.

Appellant cites but one case as an authority, *in re* Celestine, 114 Fed., p. 551.

A careful reading of this case will disclose that it has no bearing on the point discussed. That case merely held that an Indian agent could not of his own volition assume authority to maintain a suit for a writ of habeas corpus.

Indeed the opinion of the court in that very case throws doubt upon the position taken by appellant here.

It reads page 552:

"I am not prepared to say that the government cannot do such a thing if it should be necessary in any case in order to prevent a failure of justice."

Manifestly some one must have the power and authority to protect the rights of the government and those claiming under it. The water users on the Yakima project whose rights are incomplete could not, and by the federal statutes the duty is put upon the Secretary of the Interior.

"No such right (right to use water) shall permanently attach until all payments therefor are made."

Part of Sec. 5, Act of June 17, 1902, 32 Stat. L. 388.

Also from Sec. 6, *Ibid*—

"Provided title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

Again by Sec. 1, of Act of June 25, 1910 (36 Stat. L. 835); Vol. 1—1912 Sup. Fed. State. An., p. 414. Advances by the Secretary of the Treasury to the Secretary of the Interior for the "reclamation fund" are authorized for sundry purposes, among which are such "as he (Secretary of Interior) may deem proper and necessary to the successful and profitable operation and maintenance thereof *or to protect water rights pertaining thereto claimed by the United States.*

This point also was not urged in the court below, perhaps because it had already held adversely to any such contention.

In the United States vs. Union Gap Irr. Co., 209 Fed. R., p. 276, the Court said:

"The right of the plaintiff to maintain this suit is beyond question. Aside from any rights it may have acquired under the legislative act of 1905, it acquired by purchase from the Washington Irrigation Company, on the 23d day of June, 1906, the Sunnyside Canal, having its intake below Union Gap in Yakima county, together with an appropriation of 1,000 cubic feet of water per second of time, made by the Northern Pacific, Yakima & Kittitas Irrigation Company on the 22d day of April, 1891, and it has a manifest right to protect this appropriation and the rights acquired thereunder by injunction. It further appears from the testimony, to my satisfaction, that for a number of years last past, during the months of July, August and September, there has been a shortage of water in the river at the intake of the Sunnyside Canal, so that the government and its predecessor in interest could not avail themselves of the full amount of their appropriation, or if all the water to which they were entitled. This fact is so notorious that the court might perhaps take judicial notice of it, but in any event it is fully supported by the testimony."

It is stipulated (R., p. 63): "That the defendant has its point of diversion above the point of diversion for the plaintiff's Sunnyside and Wapato canals", which makes the case cited exactly in point.

ACT OF TRUSTEES BINDING ON APPELLANT.

APPLICATION OF DOCTRINE OF ESTOPPEL.

The fundamental legal doctrine determinative of the controversy seems not to be seriously disputed.

It is stated in appellant's brief that "ultra vires acts of directors do not bind the corporation or stockholder unless ratified, or unless circumstances of *equitable estoppel* exist."

Upon this statement of the law taken in connection with the undisputed facts in the record we could well rest this case.

There is an absolute failure to show any timely repudiation of the act of the officers of the defendant corporation in executing the agreement. After the government has expended large sums of money, repudiation now comes too late.

The stockholders of the West Side Irrigating Company had previously permitted its trustees to exercise like powers, not merely to compromise their rights to avoid a law suit, or to enhance its material interests, as by the agreement in this case; but actually to hypothecate the canal and water rights. Mortgages covering these rights (plaintiff's exhibit M and N) were entered into by the trustees without special authorization by the stockholders and the debts were honored and liquidated.

The following from the by-laws of the company vested such power in the trustees:

"The trustees shall make all regulations for distributing water and regulate the charge for the same."

"The trustees shall have full power to * * * enter into contracts for the sale of water." (R., p. 163.)

Other instances of the trustees exercising like powers are evidenced by the agreements with Ellison and Splawn (Plaintiff's exhibit L, and Defendant's exhibit 4).

It is a familiar principle that where a corporation permits a certain agent to exercise powers of a given character, it is estopped from denying those powers. (10 Cyc. 1066.)

If, however, it were conceded that the directors acted beyond their powers in this instance, the corporation would nevertheless be bound unless it had made timely repudiation of its agents acts before the other party to the agreement had irrevocably changed its status.

The shareholders knew that the agreement had been signed but gave no notice of any repudiation of it to any agent of the United States.

This knowledge of the stockholders as to the nature of the agreement, prior, simultaneously and immediately subsequent to the execution of the instrument is manifest throughout the record.

Six months before the instrument was signed, the shareholders had under consideration the question of making such an agreement and passed a resolution on

the subject (R., p. 281). The stockholders voted with regard to the matter on December 21, 1905, and again on January 22, 1906. (R., p. 233.)

They then appeared dissatisfied with the agreement which had been made and in 1906 obtained legal advise (R., p. 171), and since that time have been acting under the advise of counsel. (R., p. 148.) Every witness for the defense who referred to the agreement testified to his knowledge of the matter.

It would have been easy, at the time mentioned, to have brought home to the officers or agents of the Federal Government that the shareholders of the corporation repudiated this agreement, and at a time when the United States could have withdrawn from the proposed project without any loss, other than the preliminary investigation, or could have postponed action pending settlement of the rights to water from the Yakima River, as the project was not authorized until March, 1906.

Thompson writing in Cyc., p. 1076, makes the following statement pertinent to the case at bar:

RATIFICATION BY ACTS AND NEGLECTS IN PAIS.

a. By Acquiescence After Knowledge. Acquiescence for a considerable time by a corporation, through its efficient agencies and the body of its shareholders, in a state of facts, after knowledge or after such a length of time and such a condition of circumstances that knowledge is to be inferred, will operate as

a ratification in pursuance of the well-settled principle in the law of agency that a principal may ratify the unauthorized act of his agent by acquiescence or even by silence, after being fully informed of the facts and circumstances attending the unauthorized act. This rule applies where the principal is a corporation, provided the unauthorized act of the agent is within the powers of the corporation.

b. By Failing to Disavow Promptly After Knowledge. An intensified expression of the doctrine of the preceding paragraph is to say that where an agent has done an act not authorized by his principal, if the principal would disaffirm he must act at once upon obtaining knowledge of the unauthorized act.

c. By Failing to Dissent Within Reasonable Time—In General. The meaning of the preceding paragraph is that the corporation must dissent with reasonable promptness, or within a reasonable time, or as soon as it may be reasonably done after acquiring knowledge of the unauthorized act.

"A person is held to a * * * position assumed, where otherwise inequitable considerations would result to another who, having the right to do so under all the circumstances of the case, has in good faith relied thereon. Such an estoppel is founded on morality and justice and especially concerns conscience and equity."

10 *R. C. L.*, Sec. 19, pp. 689, 691.

"Ratification may also be implied, or the corporation be held estopped to deny ratification, from acquiescence on the part of the corporation. When the officers or agents of a corporation exceed their powers in entering into contracts or doing other acts, *the corporation, when it has knowledge thereof, must promptly disaffirm the contract or act, and not allow the other party or third persons to act in the belief that it was authorized or has been ratified.* If it acquiesces, with knowledge of the facts, or fails to disaffirm, a ratification will be implied, or else *it will be estopped to deny a ratification.*"

Clark v. Marshall on Corporations, p. 2188-9, and numerous cases cited.

The same doctrine has frequently been laid down by the supreme court of the United States and in the case of Indianapolis Rolling Mill vs. St. Louis, Etc., Railroad, 120 U. S., 256, it was held that two years was too long a period to delay disaffirmance of a contract executed by an agent of the corporation. The court quotes from the case of Twin-Lick Oil Co. vs. Marbury, 91 U. S. 592, the following:

"The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party, with whom that right is optional, is aware of the facts which gave him that option, are numerous. * * * The more important are as follows: Badger v. Badger, 2 Wall 87; Harwood v. R. R. Co., id. 78; Marsh v. Whitmore, 21 id. 178; Vigers v. Pike, 8 Cl. & Fin. 650; Wentworth v. Lloyd, 32 Bev. 467; Follansbee v. Kilbreth, 17 Ill. 522; S. C. 65 Am. Dec. 691." (p. 260.)

RIGHTS OF WIVES.

There was no showing that any rights of married women were involved in this litigation. Such suggestion and argument being made for the first time in the assignments of error and brief on appeal. But should there have been such, the doctrine of estoppel would apply to women stockholders or the wives of stockholders with like effect as to the men.

"And with respect to the ownership or interest in land it has been held that a married woman may be estopped to assert her rights therein where she has long acquiesced in a contract or transaction affecting it."

10 *R. C. L.*, Sec. 64, p. 746.

CONTINUED USE OF WATER BY IRRIGATING COMPANY NO DISAVOWAL OF THE CONTRACT.

The continued use of the water by the defendant corporation, if such use continued, was no disavowal of the contract whatsoever. The right to the diversion and use of water is uniformly held to be real property.

2 *Kinney on Irrigation*, 2nd E., p. 1328, Sec. 769.

The settlement effected by this series of limiting agreements divided the entire existing low water flow, and is subject to the same principles as a settlement of land boundaries. When settlement of land titles is made between owners rectifying their lines no period of adverse possession thereafter short of the statutory period would suffice.

The courts of this state hold that prescriptive title to water can only be secured by continuous, uninterrupted and adverse possession of the water for the ten-year period fixed by statute for adverse possession of land.

Spring Hill Irr. Co. vs. Lake Irr. Co., 42 Wash. 379, 383;
Allen vs. Roseberg, 70 Wash. 422, 426;
Barnes v. Belsaas, 73 Wash. 205.

AS TO ABANDONMENT.

Nor can appellant escape the operation of the doctrines of estoppel and implied ratification upon the theory that there was no intent to abandon or relinquish any rights, or that abandonment will not be presumed but must be clearly shown.

A casual inspection of the authorities cited for the defendant in this connection shows their utter inapplicability to the present situation. They relate to an abandonment not predicated upon any written instrument. In the present case the intent was reduced to writing and it is not possible for defendant to set up an intent contrary to the terms of the instrument after vast sums have been expended in reliance thereupon.

The language of the instrument is plain and unambiguous, among other things it recites:

"Whereas, no irrigation project to be undertaken by the United States within the said watershed can be recommended as feasible unless the quantity of water to which each present user from the Yakima River and its tributaries is entitled *be first definitely ascertained and agreed to,* and, whereas, the undersigned claim certain quantities of water from the Yakima River and its tributaries and are *willing to limit* their claim to the said waters to the quantities of water designated in the following schedule." (Italics inserted.)

"Now, therefore, in order to avoid litigation, to encourage the storage of water in the Yakima watershed and to secure the indirect benefit derived from further irrigation through Federal enterprise, each subscriber to this agreement or to a copy thereof, differing only as to the quantities of water specified, agreed to limit

and does limit its respective rights of appropriation from said Yakima River and its tributaries to the above specified amounts, provided, that it is hereby understood and agreed that the limitation of water rights as herein specified is made as a compromise, in order to secure the benefits above referred to." * * *

The terms of the instrument are clear and they call for the reduction of any claims the defendant company may have had to divert from the Yakima river to a maximum figure of 80 c. f. s. The intent to limit the claim of the defendant cannot now be disputed. There is no ambiguity, no possible ground for misinterpretation and whether the intent be designated one to abandon, to relinquish, to limit or to define is immaterial. The appellant intended to induce the United States to construct irrigation works in the Yakima Valley, and intended to induce rival appropriators to forego disastrous litigation and agree to set a limit upon their own rights. Appellant cannot now even plausibly urge that it did not know the nature of its act. (R., p. 135.)

The contention that the flow of water should be measured at the scores of farm headgates deserves no more than passing notice. Such a construction would deprive the United States of both the certainty as to claims and the freedom from litigation, stated to be the consideration for those instruments. If the government accepted contracts of this character they undertook to police all the canals diverting from the entire Yakima river.

THE DEFENSE OF MISTAKE.

The appellant contends that the relief should be denied on the ground that it made a mistake in fixing 80 cubic feet as its limit of right.

Our reply is threefold:

(a) Such a mistake if made is not now available since it was proved by defendant's own testimony, that its stockholders knew the limit which had been placed upon their rights shortly after the execution of the contract, and before the authorization of the federal project, and did nothing to repudiate the instrument, but rather maintained a discreet silence as regards communicating their intention to disavow the contract to the Government which was interested in the disavowal and had a legal and moral right to the information. This point has already been sufficiently discussed.

(b) The preponderance of evidence is that no mistake was made.

(c) The law requires that mistake shall be proven by clear and satisfactory proof and more than by a mere preponderance, in order that equity shall refuse to carry out a valid written instrument.

NO MISTAKE WAS MADE.

The object of defendant when the contract was signed, *as testified by the shareholders*, was to fix upon the amounts the shareholders "had been using through

their canal" (R., p. 129). The purpose to secure "the amounts of water being used" appears numerously in defendant's evidence.

Upon the question of the amount of water used there is considerable conflict among appellant's own witnesses. Some of the stockholders and trustees claim they did not know how much water they were diverting. They had never taken any measurement of how much entered the ditch (R., p. 167). One of the leading witnesses swore positively to a diversion of 10,000 inches (R., p. 94 and 99). They did not know how to measure water (R., p. 139). One of them had never heard of miner's inch (R., p. 167).

The ideas of the farmers as to water measurement and as to the capacity of the ditch and the amounts actually diverted are exceedingly chaotic and unreliable. Courts have remarked upon this fact times without number.

"The trouble with the whole line of evidence given on this subject is that it was for all practical purposes worthless, and was not founded on any actual measurements or tests, but was purely guesswork as to the volume of water that had been used by the several witnesses."

Farmers Co-operative Ditch Co., v. Irr. Dist., 102 Pac. 481, 483.

U. S. vs. Conrad Investment Co., 156 Fed.130.

Hough v. Porter, 95 Pac. 752.

ENGINEER ANDERSON'S ESTIMATES ALSO UNRELIABLE.

Anderson's observations show that the boxes were of many varieties. For example, it appears that in one case 194 "inches" equalled 4.75 cubic second feet and in another 212 inches equalled 4.57; or by simple process of division in the former case 40.8 inches equalled 1 cubic second foot and in the other 46.3 inches equalled 1 cubic second foot. (R., p. 153.) But by some process of averaging the boxes with a greater pressure with those of less, that is, apparently, the reconstructed boxes with the earlier types, he reached "an average of the measurements of all the boxes." (R., p. 153.)

Such a theoretical average box is thus described:

"The defendant's "module for the measurement of water consisted of a box, entering one side of which an orifice has been cut, the width or depth of the orifice being about four inches; the bottom of the orifice being about three inches above the bottom of the box and the top of the orifice being *five inches below* the top of the box, making the total depth of the box twelve inches." (R., p. 109.)

Mr. Anderson's testimony as to measurements made by him in 1912 does not even tend to prove what amount of water appellant was using in 1905. Before his testimony was given the following objection was interposed on behalf of the Government:

"This testimony will not be relevant or material * * * it could not be relevant under the pleadings unless defendants were first entitled to show that there was a mistake at the time the agreement was entered into between the Government and the West Side Irrigation Company, and our contention is that under these pleadings the defendant company cannot question the terms of that written agreement because they are clearly stated in the agreement; and there is no allegation of fraud and the terms are not ambiguous, but are clear." (R., p. 110.)

Anderson's testimony is also unsupported by the ditch rider and would be incompetent for the same reason which counsel for defendant urged against the Government report (plaintiff's exhibit "E"), which was:

"MR. GRAVES. I object to it on the ground that it is wholly incompetent; that there is no statement here as to the method of measurement and there is no statement by any person who took the measurements and that these readings are objected to unless there is accompanied with them the oath of the party who made the measurements." (R., p. 174.)

To obviate Mr. Graves' objection the individuals who actually made the readings and put down the figures in the report were brought in and gave testimony as to their accuracy, but Mr. Anderson's testimony was not supplemented by the oath of the ditch rider, who was the determining factor as to the comparative correctness of Anderson's water measurements.

This is clear from Anderson's testimony:

A. "Now, relative to the pressure and the miner's inch, I determined this inch was as follows. The ma-

nipulation of the box, that is, the pressure over the box, was carried on by the ditch rider and in the same manner and without any suggestion on my part—as to that my instructions simply was to him in this box I selected for calibrating was to turn it in that box as he was accustomed to measure it out in the distribution of the water throughout the canal." (R., p. 154.)

As to whether or not this ditch rider honestly and correctly followed instructions and turned the water into the box selected by Anderson "as he was accustomed to measure it out in the distribtuion of the water throughout the canal" there is a fatal failure of proof.

Although Mr. Anderson's testimony as to the module of measurement in 1912 is without value as to what conditions were in 1905. It is still interesting to note that the boxes in 1912 measured five inches from the top of the orifice to the top of the box. (R., p. 109.)

Whereas, in 1909 a resolution on the company's minutes declares that the canal *"has been enlarged* until it safely carries 5000 miners inches of water, measured under 4½ *inch pressure."* Evidently the pressure unit was enlarging through the years as well as the number of inches claimed. Considering all the evidence it is almost conclusive that in 1905 the 4000 inches as then measured and understood by all parties equalled 80 cubic feet.

As bearing on the relative value of the evidence introduced by the Government and the appellant corporation as to the amount of water diverted from the stream into the irrigating canal of corporation, and to

further accentuate the contrast, attention is again invited to the transcript of the testimony.

Mr. Noble, District Engineer for the United States Reclamation Service in 1904 and 1905, testified (R., p. 189):

"The total quantity of water diverted from the river as measured by the representatives of the Reclamation Service that had certain gauging stations, one on each canal, and the quantity of water was determined at these gauging stations. Those gauging stations generally were as near the head of the canal as the conditions would permit. In selecting a gauging station it is necessary to select a place where the conditions are favorable to get an accurate measurement."

Again on page 193:

"In 1904, 1905 and 1906 you have charge of the Government work with reference to those streams?

A. I did, yes, sir.

Q. Did you know at that time how much water was being diverted by the West Side Irrigating company?

A. Yes, sir.

Q. Could you state how much it was?

A. Yes, sir." * * *

Q. Then you may state what it was that they diverted.

A. In 1904 it was a trifle less than 70 cubic feet per second was the maximum amount, as shown by records of gauge height in the canal at the station; in 1905 it was very close to 75 cubic feet per second."

In addition to this Mitchell Stevens, who was the Vice President of the appellant corporation at the time, and who signed in its behalf the limiting agreement involved in this action, testified that he knew that the government was actually engaged in measuring the

amount of water being diverted into the West Side Irrigating company's canal. The following is from his testimony (R., p. 264):

Q. "When did you see this water gage there on the bridge—1903?

A. No, I didn't see it till 1905.

Q. Well, you saw it there in 1905. During the summer?

A. Yes, sir.

Q. You knew what it was?

A. Oh, yes.

Q. Did you know why it was there?

A. Yes.

Q. You knew that the Government was making an estimate of what water was going into these various ditches?

A. Well, that was my understanding. I understood so."

After this and on the 21st day of October, 1905, he signed the limiting agreement for the company.

The hydrographic measurements taken by the Geological Survey (Plaintiff's Exhibit E, I, P, K) and the minutes of appellant corporation (R., p. 234, 150) all point to the conclusion that at the time of the signing of the limiting agreement and prior thereto, there was less, rather than more, water diverted into defendant's ditch than was fixed by the schedule stated in the instrument.

WATER MEASUREMENTS ON MANASHTASH CREEK.

The method of measurement is stated several times in the record to have been that in vogue on the Manashtash Creek in Kittitas county and embodied in the Manashtash decree in the case of Gray et al. v. Johnson et al (R., p. 88, 97, 140), and in defendant's brief (p. 36) occurs the following statement:

"The government knew because it was doing business through skilled engineers, that after making allowance for seepage a diversion at the intake of the canal of 80 second feet of water would supply the land of the users of water from the canal less than one-half an inch per acre, and that the hay and grain lands of that valley could not be profitably farmed with that volume of water, and that every decree rendered in that valley in the last quarter of a century has given and permitted the use of one inch per acre as being needful." (R., p. 36.)

As no evidence appears in the record to indicate exactly what these decrees contain it was doubtless assumed by defendant's counsel that the trial judge who formerly presided over the Superior Court in the Yakima district would judicially notice their contents as matter of history.

From an examination of the proceedings and decrees referred to in the evidence and upon the argument, and notice by Judge Rudkin in his opinion the excerpts of which are appended to this brief it appears that appellant was seriously in error in assuming that the

Manashtash decree sustained the contention of the stockholders in this case; and that counsel's above statement both as to the methods of measurement and the duty of water is equally in error.

If we take appellant's shareholders at their word—that the company's claim in 1905 was 4000 inches as defined in the Manashtash decree we find the government position fully sustained and the estimates of Engineer Anderson completely upset.

The "Manashtash" decree recites:

"That by an inch of water wherever mentioned in this decree, is meant the amount of water which constantly flows through an opening one inch square through a plank one inch thick in the side of a box in which still water is maintained at a constant depth of *four inches above* the top of the opening."

Four thousand inches of water according to this measurement under the given four-inch pressure would not equal 90.4 second feet, the amount contended for by appellant and argued for by Engineer Anderson under an assumed *five-inch* pressure (R., p. 109), but equals approximately 80 second feet, just as appellant's attorney, Judge Kauffman, told the shareholders it would (R., p. 129) and as stated to them by Mr. Noble (R., p. 200) and correctly set forth in the instrument.

In view of the rule actually established by the Manashtash decree, which was the measure which defendant's stockholders claim they adopted, it would appear that Mr. Noble's statement of the equivalents in 1905 was entirely within the facts and the intimation of

bad faith or that he purposely misled the shareholders is without foundation.

It needs no argument to show that more water ran under the five-inch pressure in vogue in 1912 than under the four-inch pressure as of the Manashtash decree used in 1905.

ENLARGEMENTS.

Defendant began its work in 1889 with a contract to Clinesmith & Clerf. The leading witness for defense testifies that the contractors went "broke and finally threw up the contract", not having made a workable ditch. (R., p. 92.) They had failed to finish the canal (R., p. 268). A number of years went by and the company "had completed the ditch in a way" probably about 1900 (R., p. 93), but the canal was not built to carry anything like the company's present amount (R., p. 100). The company is stated to have "continuously and diligently increased its diversions and use of water upon lands in West Kittitas valley". (R., p. 94.) "They increased as fast as they were able to get water to irrigate with and run the ditch and kept increasing it". (R., p. 94.)

On August 23, 1902, the stockholders met, increased the stock to $40,000 and voted to make a *"ditch large enough to carry* 3500 *inches of water"*. (See resolution R., p. 234.) "In 1903 and 1904 Sharp, Bradshaw and Coleman enlarged that ditch." (Mitchell Stevens, R., p. 183.)

Again in 1909 there was comprehensive work done on the canal which witnesses for defense try to explain as merely a cleaning out of the ditch, which witnesses for the United States, some of them, evidently reluctant on account of having to live near the stockholders of defendant, show it to have been an enlargement by widening and deepening. (R., p. 215; p. 216; p. 236; p. 244.)

Accordingly it was recited in stockholders' resolution of December 4, 1909:

"The canal has been enlarged until it safely carries 5000 miners inches of water, measured under four and one-half inch pressure, said measurement being made at the several points of diversion of the laterals from the main canal." (R., p. 150.)

This is admittedly an increase of claim since their contention throughout the record and pleadings is that the company has always claimed 4000 inches.

The figures of the Geological Survey come with convincing force. These measurements taken by men whose lifework is that of hydrography, are not subject to the slightest impeachment. These figures show (Plff's. Exs. E, I, P and K) that in 1904 and 1905 the defendant on no single day was running water equal to 80 feet to which the defendant limited itself, the average during the height of the season being 65 to 75 feet. Witnesses were brought from as far as Georgia to prove the accuracy of the measurements taken. Counsel stipulated, however, that the other experts would agree with witness Muldrow that while the

figures were not of the highest accuracy (there being no recording device for continuous measurement), yet that they could be relied upon to within 2% or 3% of correctness. (R., p. 211.) This was corroborated. (R., p. 249.)

There was some attempt made to explain away the official figures and so prove a larger user in 1904 and 1905 than was shown by the Geological Survey measurements. But the effort did not go to the extent of proving that defendant was not diverted its full capacity, but rather that occasionally the ditch was broken and not running full on account of repair work being done. The following testimony of Mr. Stevens refers to 1904 and 1905:

"Q. And you were carrying about the same amount of water during all those years except during the time when you had these break-outs?"

"A. Yes, sir, I think so." (R., p. 263.)

This is clear confirmation of the official record. For example, plaintiff's exhibit P shows that about mid-August, 1905, defendant regularly carried 70.5 second feet. Then the stockholders became ambitious and tried to crowd their recently enlarged canal to a run of 77 feet. The ditch broke and the next day there was no water running. Then they repaired it in part and ran 46 feet on August 20, 53 feet the following day, and then ran again at 70 feet. *Thus the narration of defendant's witnesses as to trouble with the canal confirms the accuracy of the hydrographers' work.*

All attempts to undermine the substantial accuracy of the measurements utterly failed. They were not only not discredited by Mr. Anderson, engineer for defendant, but he relied upon them. (R., p. 179.) Moreover, in the verified answer and in the answer to the amended complaint, it is alleged as follows:

"That from time to time thereafter, and with reasonable diligence, the irrigated and cultivated area of said *lands was extended*, and the diversion of the waters of said Yakima River was increased, and the water so diverted was applied to the beneficial irrigation of said lands. * * * That the defendant in order to divert, carry and conserve all the water to which its shareholders were entitled, was at the time of the execution of the so-called agreement engaged in, *and has since completed, certain betterments and enlargements of its canal*, all of which work was done for the purpose of completing the appropriation and delivering to the lands of said shareholders the full amounts of water to which they were entitled from the flow of said Yakima River."

It is fundamental that allegations set up in an answer are evidence against the defendant. (16 Cyc., 968.) Such admissions have frequently been held to be conclusive. O. R. & N. Co. vs. Dacres, 1 Wash. 201.

In view of the admissions of Messrs. Stevens, the answer, the official measurements, the resolutions of the corporation and the Manashtash decree, we submit that the preponderance of the evidence shows that the defendant was diverting and using less than the 80 cubic feet of water in 1905.

If the intent, as above recited, was to fix in the agreement the amount of water which they had used

in 1905, they secured their aim with allowance for error, emergency or further development.

Preponderance of Proof of Mistake Is Insufficient.

A heavy burden of proof is laid upon appellant to prove mistake which it has utterly failed to sustain.

"*To establish mistake, the party alleging it must prove it clearly and satisfactorily, and perhaps beyond a reasonable doubt;* at any rate a mere preponderance of evidence is not sufficient. The written instrument deliberately prepared and executed is evidence of the highest character, and will be presumed to express the intention of the parties to it, *unless the contrary appears in the most satisfactory manner.*" 9 Cyc. 393.

In a Missouri case turning upon this doctrine it was said:

"There should not only be clear and unequivocal evidence, but there should be no room for reasonable doubt as to the facts relied on."

Worley v. Dryden, 57 Mo. 226; 233.

See also

Phillips v. Port Townsend Etc., 8 Wash. 529.

WOULD THE ENFORCEMENT OF THE CONTRACT BE UNCONSCIONABLE?

Even if there had been a mistake made in the sense that the shareholders did not secure as large an amount of water as they thought, the contract should not be set aside unless the enforcement would prove inequita-

ble and unconscionable toward the defendant. The argument of appellant on this point cannot prevail.

The contract was neither harsh nor inequitable for the following cogent reasons, any one of which would suffice plaintiff:

(a) The defendant in claiming 80 cubic feet and in being permitted to divert this amount has received more than it was entitled to in 1905.

(b) The amount of water secured will amply suffice defendant's shareholders for their lands.

(c) Defendant's want of good faith in its failure to annul the contract, whereby the United States was induced to expend vast sums of money is so inequitable as to estop it, both in law and good morals, from asking to be relieved from its obligation.

(d) The rights of others, and particularly of the Government, have intervened and the agreement of defendant has been acted upon for almost ten years. The harsh and inequitable results to those who had a legal and moral right to rely upon this contract vastly outweigh any inconvenience to defendant.

It should be noted that *if our position is sound upon any one of the foregoing assertions the argument that enforcement of the contract would be inequitable falls and with it the entire defense.*

The Government stands upon the limiting agreement and cannot reduce the amount specified therein, and in combatting the contention that a grevious hardship will result to appellant urges the facts, fully borne out by the record, that defendant received more by the settle-

ment of 1905 than could have been secured to it by an adjudication.

The Limitation Was a Generous Allowance Under the Law.

The entire flow of the Yakima river had been put to actual irrigation as early as 1903. (R., p. 64.) In 1905 it had become a shortage and a legal fight was on. (R., p. 59.) The valid appropriations far exceeded the user. Among others, the appropriations purchased by the United States amounted to 1054 cubic feet, while its use was 650 feet. Defendant had recently enlarged so as to divert about 65 to 70 feet.

It is admitted that the defendant corporation failed to make an appropriation of water by compliance with Sec. 6317 of the Code. The following two sections of Remington & Ballinger's Code of Washington are applicable:

"Sec. 6319. By a strict compliance to the above rules the appropriator's rights to the use of the water actually stored or diverted relates back to the time the notice was posted; but a failure to comply therewith deprives the appropriator of the right to the use of the water as against a subsequent appropriator who faithfully complies with the same."

"Sec. 6320. Persons who have heretofore appropriated water, and have not constructed works or have not diverted the water and applied it to some purpose, as herein stated, must, within thirty days after this act takes effect, proceed as in this chapter provided, or their right ceases."

Remington & Ballinger's Code, Sec. 6319, 6320.

Such being the case, what was defendant's status before the law in 1905 and how far would the doctrine of relation have been invoked in its favor? This question is particularly pertinent in view of the fact that there were appropriators, of whom the United States was one, who had complied with the law as regards the filing of an appropriation.

"It is also the universal rule of law upon the subject that by not posting or recording a notice, or the posting or recording of a faulty notice, the appropriator loses his right to apply the doctrine of relation, from the time of the actual application of the water to some useful purpose back to the date of the posting of his notice, and he thus fails to shut off the rights of intervening claimants who have complied with the statute in this respect, and, therefore, his own rights to the use of the water should there not be ample for all, may be cut off by those who have strictly complied with the statute. *For the rule is that where an appropriator of water does not post and file for record his notice of appropriation* as provided by law, *his right dates only from* the last act perfecting such appropriation, which, as we shall see in a subsequent section, is *the actual application of the water claimed to some beneficial use or purpose.*" Kinney on Irrigation (2nd Ed.), p. 1262.

A similar statement of the law is made by Wiel on Water Rights in Western States, page 405.

The Idaho court held as follows:

"It is not shown that a location notice of water right was filed or posted as required by law, and for that reason, if appellant is entitled to any water, under said evidence, it would only date from its actual application to said land."

Pike v. Burnside, 69 Pac. (Idaho), 477, 478;

Similarly

Murray v. Tingley, 50 Pac. (Mont.), 723, 725.

The State of Washington adheres to the same rule, and in case of failure to comply with the appropriation statute the right relates back to the application to beneficial use and not to the initiation of the enterprise.

In the case of State *ex rel* Ham, Yearsley, Etc. vs. Superior Court, 70 Wash. 442, 462, the court, after quoting the appropriation statutes, says:

"It is plain from these provisions that no acts or work looking to an appropriation of water will cause the completed appropriation to relate back to the time of its actual accomplishment, except the posting and recording of appropriation notice be done as provided by Sec. 6317. * * * It is provided by Sec. 6319 that a failure to comply with the rules prescribed by these sections, 'deprives the appropriator of the right to use the water as against a subsequent appropriator who faithfully complies with the same.' It evidently is the legislative intent that such an appropriator will not lose his right of appropriation by mere want of diligence short of an abandonment of his claim, except as against a subsequent appropriator who complies with the provisions of these sections; and it is apparent there cannot be such an appropriator except it be one who causes to be posted notice of appropriation, *or, possibly, one who has made a completed physical appropriation of the water.*" (P. 462.)

The rule under discussion is carefully to be distinguished from cases like Kendall vs. Joyce, 48 Wash. 489, where full use is made before the passage of the act requiring posting and filing of notices and where the right relates back to the beginning of the work.

What then was the measure of the defendant's rights October, 1905?

It is admitted that the filing for the Sunnyside main canal was made in 1891 and beficcial use was made by the United States and its predecessors to the extent of 650 feet in 1905. The rule to be invoked, as regards beneficial use by the Government, since its predecessor had complied with the statute, was the very favorable one laid down in the last quotation above.

Hence the contrasting rights of plaintiff and defendant in 1905 were these:

(a) Appellant had the first right to the amount actually diverted and beneficially used when complainant's predecessor filed in 1891 (R., p. 61). This was unquestionably but a very small amount. (W. A. Stevens, R., pp. 38, 92, 100, 234.)

(b) The Government has the next right up to 1054 cubic feet short of an actual abandonment.

(c) Appellant could have won additional water only by ten years' adverse possession, but the supply put to beneficial use in 1895 was certainly less than 80 cubic feet. The burden is on appellant to prove its right to more than 80 feet by convincing evidence and after having shown that it is wronged by the contract. The evidence here is all against appellant. The minutes of the corporation, the history of the company given by W. A. Stevens, the proof of substantial enlargement by Sharp, Bradshaw & Co. in 1903 and 1904 shows that nothing like 80 cubic feet was used in 1895.

It is readily inferable from the record that there are other rival appropriators whose rights, under the same doctrine as to compliance with the statute, would

have obtained similar priority over this appellant had the adjudication been gone forward with in 1905.

On October 21, 1905, appellant was therefore in very precarious position to obtain anything like its then user and the settlement was a very beneficial one to it. The position of the Washington Irrigation Co. on the other hand, having complied with the statute, was strong to the extent of 1054 cubic second feet, 40,000 acres having been placed under cultivation as shown by the record.

Thus appellant utterly fails to show that the settlement of 1905 was an unfortunate one for it and that the enforcement of the contract would be inequitable. On the contrary the corporation obtained far more than it could have secured by an adjudication at that time.

It may also be remarked as to present status of priorities that the United States waived its right to claim in excess of 650 feet for the Sunnyside canal, in order to bring about the adjustment of 1905, but as to any claimant not within, or as to any adverse contender successfully setting aside, such an agreement the Government would certainly have a right to assert its full claim.

The Limitation Not Inequitable But a Generous Allowance in Fact.

The restriction to 80 cubic feet after July 1 sought by the complaint, is as large a supply as is required by the stockholders of defendant.

The decrees of the Superior Courts hereto appended relate to irrigated lands in the same neighborhood of Kittitas county. These allowed to litigants a far less amount than claimed by appellant and less than the 80 feet of the agreement. The Manashtash decree is for one-half inch to the acre during July to September. Defendant claims 4000 inches measured from the canal under pressure five inches from the top of the orifice for an area of 7000 acres, while the decrees cited award as sufficient but *one-half inch to the acre under a less pressure*—(less pressure except in case of the Reeser creek decree).

It is admitted that a miners inch under four-inch pressure equals one-fiftieth of a second foot, eighty feet therefore would equal 4000 inches so measured or a supply for 8000 acres at the rate of one-half inch per acre. The irrigated acreage claimed, however, is but 7000 acres, leaving 500 inches or 12½ per cent for losses.

Mr. Anderson's attempts to show that 104 second feet must necessarily be diverted from the river (R., p. 116) to supply 90.4 second feet to the land. (R., p. 111.) The net seepage loss as he contends, is 13.6 cubic feet, or 13.1 per cent. The loss would be greater apparently but that the canal has very large accessions from irrigated lands above. (R., p. 122.)

Then if 13.1% is lost, and 80 feet allows but 12½% for loss in order to deliver one-half inch per acre under four-inch pressure to the land after July 1, a very slight improvement in the canal, at points where Anderson

proved extreme losses, is all that would be necessary to provide ample water. It certainly cannot be deemed unconscionable that the appellant in order to obtain so satisfactory a settlement should in 1905 set itself a limit such as would require a little more skill in the carriage of water through its canal.

In fact so slight an improvement in facilities could doubtless be forced on defendant by the courts if no contract had been made even at the suit of later appropriators.

Mr. Justice King in the leading Oregon case of Hough vs. Porter, 98 Pac., p. 1102, 1103, says:

"In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted because it could be exercised without substantial injury to any one; and no right to such methods of use was acquired thereby."

Mr. Justice Morrow in the case of Anderson vs. Bassman, 140 Fed. 10-26 (C. C. A.), approves the following:

" 'The time is near at hand when greater attention must be given to these matters (care in the use of water), and greater care and caution be exercised, to prevent parties from loss and damage which are or may be occasioned to other parties having equal rights to the waters of the river. An excessive diversion of water for any purpose cannot be regarded as a diversion to a beneficial use. Water in this state is too scarce, needful, and precious for irrigation and other purposes to admit of waste.' "

Where the soil is porous the appropriator must improve the canal when water becomes scarce. Shotwell vs. Dodge, 8 Wash. 341; 36 Pac. 254.

A supply of say an inch to the acre under four-inch pressure or 1/50 of a second foot during April to June and prior to the period as to which the United States seeks relief, would amount to approximately 3.6 acre feet. "One second foot of water flowing continually for 24 hours will amount to 86,400 cubic feet, or nearly two-acre feet." Kinney on Irrigation, 2nd Ed., p. 1582. Half that supply during July to September inclusive would amount to 1.8 acre feet more.

Surely five and four-tenths feet deep of water over the land is ample to all necessities. It is more than can lawfully be appropriated in several states.

Nebraska and New Mexico allow but one cubic foot *as a maximum appropriation* for each 70 acres (Neb. L. 1911, p. 505; N. Mex. Act of March 19, 1907, Sec. 43).

Nevada allows at the most but 3 acre feet where the season is not over six months. (Nev. Act. of Feb. 26, 1907, Sec. 5.)

The North Dakota limit is one cubic foot to 80 acres. (N. Dak. Act. of Mar. 1, 1905, Sec. 49.)

In the case of Anderson vs. Bassman, *supra*, the court *takes judicial notice* that a less *amount than defendant herein claims was excessive:*

"It needs no argument to show that this claim is excessive (i. e. 1.14 inches to the acre under 4 inch pressure), exclusive of other sources." 140 Fed. 29.

The burden is on defendant to prove that a larger supply than the contract amount *is necessary* if it would show the enforcement of the contract to be unconscionable. The only evidence in the record on this supremely important subject is the following:

"I will ask you this question: From your knowledge and long acquaintance there on the West Side and knowledge of the conditions is the amount of 4,000 inches, according to the measure of inches which you use, a needed amount when measured out through the measuring box taken out of the canal a necessary amount for the proper irrigation of this land lying under the canal?

I doubt very much if it is sufficient amount to irrigate all of the lands *when put under cultivation.*" (R., p. 97 and 98.)

In so far as defendant urges its necessities for more water it is for the purpose of rounding out the farms under the canal and putting in the remaining untilled lands. The company apparently sets up the right at this late date, and in violation of the agreement to increase its area and utilize the last issue of stock which the record shows has a value of $30 a share. (R., p. 164.)

THE BALANCE OF THE EQUITIES STRONGLY FAVOR COMPLAINANT.

When dissatisfaction with the settlement arose the question was raised as to the course to pursue. Should they, before the United States had started upon its enterprise, seek a cancellation or reformation of the instrument? They naturally feared the outcry from the

people of the valley against litigation, the precipitation of the matter into the courts, possibly repudiation by others, and the reconsideration or delay of government work which would have followed unless the Secretary of the Interior reversed his policy outlined to Representative Jones.

Such a step they were evidently not willing to take. They wished to secure the advantages of the Federal project and to await a date for repudiation of their contract when the United States could not withdraw or withhold action pending decision of the defendant's suit.

An informal conversation was had by Mitchell Stevens, one of the stockholders, with Mr. Noble, who had left the employ of the United States many months previously and was then employed by the county, and advising Mr. Stevens about other business (R., p. 191). Mr. Stevens then stated that the company would not abide by the agreement. The disavowal was never communicated to any agent of the United States and if Mr. Noble had still been in employ of the Government the conversation had was unofficial so far as the company was concerned and Noble would not have been justified in assuming that Stevens spoke for the company upon so important a matter.

Nothing further was done until 1909 (R., p. 151), when the stockholders authorized suit to set aside the agreement, having now as appears in the resolution enlarged the canal to a capacity of 5000 inches. (R., p. 150.) But again for reasons which do not appear

no suit was instituted and plaintiff was permitted to go on expending its money without notice of disaffirmance. And now the United States has expended $8,000,000 upon the project, not a dollar of which would have been expended without the settlement of the water rights, while defendant's stockholders sat quietly by determining to repudiate their agreement at an opportune time.

The Agreement Is a Necessary Part of an Intricate Adjustment. It Cannot Be Destroyed Without Widespread Effects.

The position of appellant appears to be that while the settlement with all other water users made at the same time and under the same circumstances should be enforced, this particular contract should be so construed as to nullify it!

It must be recalled that the aggregate claims of all the users was required to be reduced, and was reduced after great effort (Splawn, R., p. 82) to the amount to be found in the river in normal seasons during the low water period. The requirements of the situation were presented to users in the following terms:

"* * * in order for the government to come in this valley and undertake a project it was necessary that the water rights all be confined to a quantity that would not exceed the flow of the stream, and that if they signed for more than was actually diverted by them that somebody else would have to sign for less, and that it was up to them, the people as a whole and the committees, to determine what each could or would sign for." (R., p. 187.)

But the figures inserted in the contracts were left to the signers and to the committee and not to the agents of the United States. (R., p. 187.) The water was therefore apportioned among the claimants and the proposition as submitted to the Secretary of the Interior showed that the claims had been reduced to come within the limits of the actual supply.

This being the case, it is pertinent to inquire if the agreement is to be set aside from what source will the defendant be supplied to furnish the addition to the limitation figure.

From which of the other claimants will defendant obtain this additional flow? Or will all of the 50 canals and ditches be called upon to contribute?

This is manifestly a test case for if one of the corporations executing limiting agreements is able to avoid the consequences upon the doctrines asserted by appellant, the decision would doubtless become a precedent for similar action by others and the entire extra-judicial settlement be vitiated.

If appellant prevails in this suit, all water rights from the Yakima river must be adjudicated in Court, for the plaintiff as appropriator for its Sunnyside and Indian Reservation projects cannot permit itself to be deprived of its just rights.

The necessity that these limiting agreements be kept in good faith is as important to the present and future successful operation of the Government Reclamation Project at Yakima as their execution was necessary to procure the inception of the work, and we respectfully

submit that no sufficient showing has been made for modifying their terms or construing them out of existence.

FRANCIS A. GARRECHT,
United States Attorney,
Spokane, Washington,

E. W. BURR,
Special Assistant to U. S. Attorney,
Attorneys for Appellee.

APPENDIX.

Excerpts From Decrees and Findings Rendered in Certain Cases.

IN SUPERIOR COURT OF KITTITAS COUNTY, STATE OF WASHINGTON.

Christopher Gray and S. R. Geddis,
Plaintiffs,
vs.
Ole Johnson, *et al.*,
Defendants.

Nos. 99 & 100
Journal 3,
p. 123
DECREE

I.

That by an inch of water wherever mentioned in this decree, is meant the amount of water which constantly flows through an opening one inch square through a plank one inch thick in the side of a box in which still water is maintained at a constant depth of *four inches above* the top of the opening.

II.

That wherever any number of inches of water is herein awarded to any person, said number of inches are awarded to such person during the months of *April, May and June perpetually,* and *half that number of inches during the remainder of the year* is awarded to such person.

WM. H. UPTON,
Judge.

Dated April 15, 1891.
Entered May 15, 1891.

Manashtash Creek.

Gray & Geddis,
vs.
Johnson, *et al.,*

FINDINGS OF FACT.

9.

That among the earlier settlers upon said lands, it was the custom to irrigate their lands by flooding them, using perhaps ten times the amount of water required under the methods now in use.

10.

That under the system of irrigation now in vogue, among all the parties to this action, *one (1) inch of water per acre,* in the months of *April, May and June,* and *one-half* an inch of *water per acre during the remainder of the year,* is necessary and sufficient to irri-

gate all the lands mentioned in the pleadings herein, except a few small parcels which are hereinafter specified.

Manashtash Creek.

James Ferguson, *et al.*,
vs.
The United States National Bank of Portland, Oregon, *et al.*,
No. 2607

Entered Journal 12, p. 397
FINDINGS & CONCLUSIONS.

II.

That by the term "inch of water under a four-inch pressure", is meant all the water that will flow through an orifice one inch square in a box maintained at a level into which a sufficient amount of water is let to keep the surface thereof four inches above the center of such orifice, the bottom of such orifice being two inches above the bottom of such box.

VI.

That *one inch* of water measured as aforesaid flowing continuously during the spring months is necessary for the proper irrigation of an acre of the said lands, and *one-half inch* for each acre measured as aforesaid from and after *the first day of July of each year.*

THOS. H. BRENTS,
Judge.

Dated May 6, 1901.

Nanum Creek.

Mary A. Clerf,
vs.
Robert I. Scammon, *et al.*,

No. 3535
Entered Journal 18, p. 210
FINDINGS & CONCLUSIONS.

IV.

That all the lands contiguous and adjacent to said Caribou Creek are naturally dry and arid and will not produce agricultural crops without artificial irrigation. That by economical distribution and use of the waters of said Creek, said lands can be made to produce profitable agricultural crops by the application of *one-half of one inch of water per acre,* and the allowances and amounts hereinafter awarded to the several parties hereto are based upon such an amount per acre. That, following the custom obtaining in that locality, the amounts herein allowed shall be measured by the inch, according to the custom of miners, under a *four-inch pressure.*

DECREE.

1.

That by the terms "inch of water", "an inch of water under a four-inch pressure", or "an inch of water under a four-inch pressure, measured according to the custom of miners", is and shall be meant an amount of water which shall continuously and constantly flow through an orifice one inch square in a box, maintained

at a level, into which a sufficient quantity of water is let to keep the surface thereof four inches above the center of such orifice, the bottom of such orifice being two inches above the bottom of such box.

RALPH KAUFFMAN,
Judge.

Dated April 25, 1911.

Caribou Creek.

P. H. Schnebly, *et al.*,
vs.
Harvey Huss, *et al.*

No. 4762.
Entered Journal 21, p. 7
FINDINGS &
CONCLUSIONS.

4.

That the parties hereto through their respective attorneys have *stipulated* and agreed in open court that one-half inch of water, miner's measure under a *four-inch pressure,* being one one-hundredths of a cubic foot per second of time, shall be the amount to be allotted for the irrigation of each acre of land for which water is claimed in this action.

DECREE.

1.

That wherever in this decree the term "an inch of water" is used it shall be deemed to be the equivalent of one-fiftith of a cubic foot of water per second of time.

RALPH KAUFFMAN,
Judge.

Dated Feby. 1st, 1915.

Coleman Creek.

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4.

That almost all of the lands belonging to the parties in this case are naturally dry and arid and will not produce agricultural crops without irrigation, and that such irrigation is necessary for said lands during the spring, summer and autumn months.

5.

That one-half of an inch to the acre is sufficient water for the irrigation of the lands of the parties here-

to; that by one-inch of water mentioned in these findings and in the conclusions of law and decree, is meant an inch of water measured under six-inch pressure according to the custom of miners.

N. B. RIGG,
Judge.

Dated May 18, 1906.

Reeser Creek.